ORIGINAL

No. 90-5538

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

ZAKHAR MELKONYAN - PETITIONER

vs.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH
AND HUMAN SERVICES - RESPONDENT

REPLY BRIEF FOR PETITIONER

John Ohanian, Attorney at Law
A Professional Corporation
6381 Hollywood Blvd.,Ste. 765
Los Angeles, CA 90028
(213) 462-5540
Counsel of Record

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-5538

ZAKHAR MELKONYAN - PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Respondent's brief confuses the issues in this case and incorrectly concludes that there is no conflict between the Third, Fourth, and Eleventh Circuits' decisions in Guthrie v. Schweiker, 718 F.2d 104 (4th Cir. 1983, Brown v. Secretary of HHS, 747 F.2d 878 (3rd Cir. 1984), and Taylor v. Heckler, 778 F.2d 674 (11th Cir. 1985), respectively as compared to the Ninth Circuit's decision in Melkonyan v. Sullivan, 895 F.2d 556 (9th Cir. 1990), so respondent recommends that the Court deny petitioner's request for a writ of certiorari.

I. The split in circuits remains as to whether an administrative decision after a court remand is the "final judgment in the action" under the EAJA.

Respondent's brief contains numerous arguments in support of his position. Initially, respondent contends that "there is no post-Finkelstein circuit conflict on the question whether the Secretary's final and non-appealable decision on remand may be regarded as a "final judgment" for purposes of EAJA." Respondent misinterprets Finkelstein as overruling Guthrie, Brown, and Taylor.

Respondent's conclusion is based in part on his misstatement of the language of the Equal Access To Justice Act (EAJA), which is in issue here. The question is not whether an administrative decision after court remand can be a "final judgment," but whether it can be a "final judgment in the action." EAJA, 28 U.S.C. Section 2412(d)(1)(B) [emphasis added]. The 1985 amendments of the EAJA clarified the words "final judgment" to mean a judgment which is no longer appealable, and did not disturb the remaining phrase "in the action." Pub.L.No. 99-80, 99 Stat. 185, codified at 28 U.S.C. Section 2412(d)(2)(G).

There is nothing in Sullivan v. Finkelstein, 110 S.Ct. 2658 (1990), to indicate that this Court intended to overrule Guthrie, Brown, or Taylor, and furthermore, Finkelstein cites Guthrie and the procedure required by 42 U.S.C. 405(g) with approval.1/ Respondent's argument overlooks the fact that Hudson approved the very cases which the court below refused to follow. (See pp. 7-9, of petition for writ of certiorari). Thus, respondent's arguments

---

1/ See Finkelstein v. Sullivan, id., n. 8, at p. 2665.

are based upon erroneous interpretations of Finkelstein, and Hudson.

A. Finkelstein was not an EAJA case, and took pains to preserve the longstanding prior law on timeliness of attorney fee applications under the EAJA.

Respondent interprets Finkelstein, to overrule the prior EAJA case law in three circuits (Guthrie, Fourth; Brown, Third; and Taylor, Eleventh), on the question of timeliness of EAJA applications. However, Finkelstein carefully distinguished its holding that certain "judgment[s] under 42 U.S.C. Section 405(g) are appealable "final decisions" under 28 U.S.C. Section 1291, from any conclusions about timing of attorney fee applications under the EAJA. Sullivan v. Finkelstein, id. at pp. 2665-67 & n. 8. The decision in Finkelstein is distinguishable from the decisions in Hudson, Guthrie, and the legislative history of the 1985 amendments to the EAJA, since Finkelstein was concerned with appealability, and not the running of the 30-day EAJA clock. Finkelstein therefore should not be read to affect attorney fee contexts without careful consideration by this Court. To do so, would create serious conflicts with existing law. For example, under 42 U.S.C. Section 406(b), a judgment of the court favorable to the claimant is needed as a predicate for an award of regular attorney's fees under the Social Security Act.

B. Respondent does not recognize any conflict between Myers v. Sullivan and Melkonyan.

Respondent also contends there is no conflict between Myers v. Sullivan, 916 F.2d 659 (11th Cir. 1990), and Melkonyan. This

is contraindicated by the Myers court's statement that Melkonyan, "would seem to be contrary to Sullivan v. Hudson." (See pp. 679-680, & n. 20). Moreover, the thrust of the decision clearly indicates that if the Myers court were to have decided the issue in Melkonyan, that it would have disagreed with the Ninth Circuit's decision. The Myers court was faced with the question of whether the 30-day clock begins to run when the district court enters its final judgment, or when the 60-day time for appeal by the Secretary from the district court's judgment expires.

The Myers court held that in the case of contested remand orders, the 30-day clock does not begin to run until expiration of the 60-day period. However, where the remand order is not contested by the Secretary, who agreed to pay the full amount of the disability benefits requested on remand, the 30-day clock begins to run when the district court enters its final order dismissing the case. Thus, the decision in Myers indicates that the Eleventh Circuit still follows Taylor v. Heckler, id., and until a court has entered final judgment, the 30-day clock will not commence to run. Consequently, it is clear that if the Myers court had been presented with the issues in Melkonyan, it would have decided that since the district court had not yet entered a final judgment, that the 30-day ock had not begun to run.

In addition, it is only a matter of time before other circuits issue decisions that will directly conflict with Melkonyan. In this regard, a number of district courts have recently issued decisions that disagree with Melkonyan. See Bradley v. Secretary,

of HHS, 741 F.Supp. 1461 (D.Idaho 1990); and Gutierrez v. Sullivan, 734 F.Supp. 969 (D. Utah 1990).

C. Respondent argues that the Appeals Council's decision is a final judgment in the action.

Secondly, respondent points out that "judgment" is used as a term of art having special application to judicial proceedings and typically refers to an order of a court that is appealable. Respondent argues that since the EAJA definition of this term requires the order to be "final and not appealable," this departure reinforces the conclusion that Section 2412(b)(1)(B) should not be read to limit the "final judgment[s]" that trigger the 30-day filing period to orders that have been entered by the courts.

While respondent's argument may be technically correct with respect to the definition of "judgment," it ignores the fact that when Congress passed the August 5, 1985, amendments to the EAJA, it did not intend a major overhaul of the Act, but merely wanted to indicate its preference for the Seventh Circuit's decision in McDonald v. Schweiker, 726 F.2d 311 (7th Cir. 1983), over the Ninth Circuit's decision in McQuiston v. Marsh, 707 F.2d 1082 (9th Cir. 1983). It was also significant that Congress cited Guthrie with approval. Legislative history2/ also reveals Congress stated that neither the judicial remand to the agency nor the agency decision after remand constitutes final judgment.

2/ See p. 6, of petition for writ of certiorari, and Myers v. Sullivan, at pp. 667-672.

Respondent contends Finkelstein held that sixth and seventh sentence remands under 42 U.S.C. Section 405(g), are concerned with special and limited sorts of remand, and petitioner errs in relying on the passing reference in Hudson (109 S.Ct. at p. 2255) to the description of the sixth sentence of Section 405(g) in Guthrie v. Schweiker, 718 F.2d 104, 106 (4th Cir. 1983). Respondent then concludes that nothing in the district court's remand order in Melkonyan suggests that the remand was pursuant to the sixth sentence of Section 405(g). The district court styled its order a "judgment" and stated that "the matter is remanded to the Secretary for all further proceedings," as was the case in Finkelstein. Respondent concludes that the district court thus "clearly contemplated that it was terminating all judicial proceedings on the merits of petitioner's claim for benefits and returning the matter to the jurisdiction of the Secretary, just as was done in Finkelstein."

Respondent is mistaken in characterizing the remand in this case as a "sentence-four" remand, since it clearly was a "sentence-six" remand. The remanding court never reached the merits of the case, but remanded to consider new evidence. It is the purpose of the remand and not the language of the remanding court's order, which makes a difference under Finkelstein, id. at pp. 2663-2664. In addition, respondent's technical analysis ignores the fact that the thrust of the decisions in both Finkelstein and Myers fully require that the Secretary comply with 42 U.S.C. Section 405(g), before the 30-day clock begins to run.

II. The decision below also conflicts with decisions of this Court and other circuits re: tolling and non-retroactivity where an applicant reasonably relied upon the government's statements and prior circuit law.

Finally respondent concludes that all of the decisions upon which petitioner relies for his assertion of a circuit conflict rest on premises that have since been shown by Hudson and Finkelstein to have been erroneous, and because the asserted circuit conflict has been superceded, it does not warrant review.

Respondent also contends that the "[p]etitioner had no reasonable basis for believing that a fee request filed more than a year after the Appeals Council's uncontested finding of disability would be deemed timely." (Res. p. 21). Petitioner has attached hereto an Appendix, which provides a chronological listing of events which demonstrates that Melkonyan, and others similarly situated, were caught in a trap for the unwary by the misleading statements of the Secretary.

Even conceding that respondent is correct in his contentions as discussed above, equitable principles require that Hudson and Finkelstein should not be applied retroactively. In Myers v. Sullivan, id., at pp. 677-678, the court held that Finkelstein should not be applied retroactively relying on this Court's decision in Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 296 (1971), for the rule that a judicial decision should not be applied retroactively, where 1) it establishes a new principle of law or decides an issue of first impression whose resolution was not clearly foreshadowed, 2) the court determines

that retrospective operation will retard operation of the law, and 3) where the court's decision could produce substantial inequitable results if applied retroactively.

Recently, in Irwin v. Veterans Administration, No. 89-5867 (Dec. 3, 1990), this Court held that a limitations period similar to the 30-day EAJA filing period, may be equitably tolled if the plaintiff relied on conduct by the United States which was misleading. The Secretary has consistently told this Court and circuit courts that he would return to court with any decision he reached after court remand. The Secretary assured this Court in both Hudson and Finkelstein, that he would bring his decisions after remands back to court, so that the court could comply with 42 U.S.C. Section 405(g). (See p. 12, of petition for writ of certiorari). These statements by the Secretary trapped litigants like Melkonyan who felt safe in waiting for the Secretary to bring his remand decision back to court as required by Section 405(g), and as promised by the Secretary. Under Irwin v. Veterans Administration, id., such conduct tolls the 30-day clock.

In this connection, it should be noted that another panel of the Ninth Circuit in Beckstead v. Sullivan, No. 89-15715 (9th Cir. Dec. 5, 1990), (not published), 1990 U.S. App. LEXIS 21246, has recently held that Melkonyan should not be applied retroactively. It is also relevant to note that if the district court below intended to do what respondent now contends, the district court would have promptly dismissed petitioner's application for EAJA attorney's fees on the ground that it was not timely filed,

instead of ruling on February 18, 1987, that the government's position was substantially justified. It should be clear that the district court still believed, as did the petitioner, that Guthrie and 42 U.S.C. Section 405(g) required compliance by the court entering a final judgment.

It is quite apparent that the Eleventh Circuit's decision in Myers v. Sullivan, id., does not concur in the Ninth Circuit's decision in Melkonyan, and indicates that Guthrie, Brown, Taylor, and 42 U.S.C. 405(g) are still the law of the land. It is quite apparent that in time other circuits, particularly the Third and the Fourth will undoubtedly disagree with Melkonyan. Moreover, while the Secretary has informed the courts that he complies with Guthrie, and 42 U.S.C. Section 405(g), (See Appendix pp. 1, 4, and 5), the record reflects that he has not complied with Section 405(g) for some time, and now states that such compliance is not necessary.

Respondent argues that "the appellate decisions cited by petitioner (Pet. 14) as having suggested a contrary rule -- the Fourth Circuit's decision in Guthrie and the Third Circuit's decision in Brown -- were not binding on the District Court for the Central District of California in this case. And those decisions were handed down before the 1985 amendments to the statutory scheme that made clear that the term 'final judgment' for purposes of EAJA departs substantially from its meaning in the specific contexts of judicial proceedings." (See respondent's brief p. 21). The logic of this argument which contends that petitioner

should not have relied upon case law from other circuits which predated the 1985 EAJA amendments, is flawed since there is nothing in the Act to suggest that the amendments overturned past precedent, except for McQuiston v. Marsh, id. However, all circuits selectively follow case law from other circuits, including the Ninth.

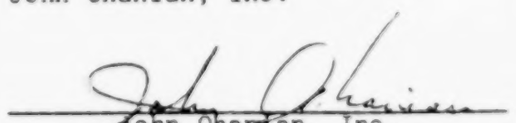
III. Conclusion

Respondent's arguments do not accurately describe the applicable law, and ignore the uncertainty, confusion and conflicts which have existed in the courts and among the practicing bar since passage of the August 5, 1985, amendments to the EAJA, as well as the Secretary's failure to in fact comply with his assurances to the courts that he complied with Guthrie and 42 U.S.C. Section 405(g). It is clear that the Secretary has misled the courts and the practicing bar in this respect.

Petitioner respectfully requests that a writ of certiorari issue.

Respectfully submitted,

John Ohanian, Inc.



John Ohanian, Inc.
Counsel of Record for Petitioner
A Professional Corporation

6381 Hollywood Blvd., Ste. 765
Los Angeles, CA 90028
(213) 462-5540

APPENDIX

Summarized below are certain events listed in chronological order which demonstrate that the petitioner and others similarly situated were caught in a trap for the unwary.

1. On September 19, 1983, the court in Guthrie v. Schweiker, id., held that the Secretary had to comply with 42 U.S.C. Section 405(g) and file any "additional and modified findings of fact and decision, and a transcript of the additional record and testimony ...", so that the district court could then enter its final judgment, which would commence running of the 30-day period.

2. On November 23, 1984, the Third Circuit in Brown v. Secretary of HHS, id., wrote "[t]he Secretary ... indicates that should a claimant receive benefits upon remand, the case must still return to the district court for a final judgment." When the court issued its decision in Brown, there was no dispute among the circuits that the 30-day clock began to run after the district court issued its final judgment.

3. On May 7, 1985, the Appeals Council issued its favorable decision granting the petitioner the disability benefits that he had applied for on May 28, 1982. Based on the available legal precedent, the courts and the practicing bar were in agreement that the 30-day EAJA clock did not begin to run until after 1) the Secretary filed his compliance with the district court, and 2) the court entered its final judgment, as the Secretary had assured the court in Brown v. Secretary of HHS, id. There was no question that both Guthrie and 42 U.S.C. Section 405(g) required

the Secretary to file his compliance with the court's remand order, and that the district court would then enter its judgment, thus triggering the running of the 30-day EAJA clock.

4. On August 5, 1985, Congress amended the EAJA by defining "final judgment" as a "judgment that is final and not appealable, and includes an order of settlement..." The legislative history reveals that Congress intended this added language to show its concurrence with the Seventh Circuit's views as expressed in McDonald v. Schweiker, id., and as opposed to the Ninth Circuit's decision in McQuiston v. Marsh, id., with respect to interpretation of the term "final judgment." The House Report emphasized that "this section should not be used as a trap for the unwary resulting in the unwarranted denial of fees," and warned courts to "avoid an overly technical construction" of the timeliness requirement.1/

5. On December 16, 1985, the Eleventh Circuit in Taylor v. Heckler, 778 F.2d 674 (11th Cir. 1985), agreed with the decisions in Guthrie, and Brown, that the Secretary must comply with 42 U.S.C. Section 405(g), so that the district court could enter its final judgment and the 30-day clock would begin to run.

6. Petitioner filed his application for EAJA attorney's fees

1/ See H.R.Rep.No. 120, 99th Cong., 1st Sess. 18 n. 26, reprinted in 1985 U.S.Code Cong. & Admin. News 132, 146 n. 26. Also see Myers v. Sullivan, id., at 667 and 668, for "Pre-1985 Authority," and "The 1985 Amendments and Implementing Case Law."

on May 19, 1986, in U.S. District Court, and based upon the then existing law and respondent's public statement in Brown that he would comply with 42 U.S.C. Section 405(g), there was no question in counsel's mind that the 30-day clock did not begin to run until the Secretary had filed his motion with the district court, and the court had then entered its judgment or order.

7. On December 1, 1986, the court in Warner v. Bowen, 648 F.Supp. 1409 (S.D.Fla. 1986), considered the Secretary's arguments as to when "final judgment" occurred in the case: 1) when the order of remand issued, and alternatively 2) when the favorable administrative decision issued after remand, and declared that "the Secretary's current posture that non-action and non-notification to the Court constitutes final judgment is somewhat incredulous." The court held that 42 U.S.C. Section 405(g) required the Secretary to inform the court of its decision so that it could issue a final judgment which would commence the running of the 30-day period.

8. On January 13, 1987, the court in La Manna v. Secretary of HHS, 651 F.Supp. 373, 376 (N.D.N.Y. 1987), stated that its "examination of the applicable case law here reveals an area of uncertainty and possible confusion to the bar in matters relating to application for attorney's fees under the Equal Access To Justice Act. The uncertainty revolves around whether the thirty-day period during which the fees application must be filed commences upon the date of entry of the district court's order, as held in Tripodi, Taylor, and Guthrie, or whether the district court must

take into account the possibility of an appeal of its order, and if so, the effect of an appeal on the commencement of the running of the thirty-day period."

9. On February 18, 1987, the district court below denied petitioner's application for EAJA attorney's fees for the sole reason that respondent's position had been substantially justified. The court must have considered running of the 30-day clock, but apparently concluded that since respondent had not yet complied with 42 U.S.C. Section 405(g), the 30 day time limit was not in issue. The court said nothing to indicate that petitioner's application was not filed timely.

10. On July 30, 1987, a Deputy Clerk of the Ninth Circuit issued an order in Melkonyan which said, "[a]ppellant apparently failed to satisfy the requirements of 28 U.S.C. Section 2412(d), when he filed an application for attorney's fees over one year after judgment was rendered in the district court. Therefore, it is unclear whether the district court had jurisdiction to entertain appellant's motion for fees." This was the first indication by the courts below that the petitioner's motion for EAJA fees might not have been filed timely.

11. The Secretary informed this Court by his brief in Sullivan v. Hudson, id., (decision issued June 12, 1989), that he would comply with the procedure required by Guthrie, and 42 U.S.C. Section 405(g).

12. On June 30, 1989, the Ninth Circuit instructed the district court to dismiss petitioner's EAJA petition on the ground

that it had not been filed timely.

13. After petitioner filed a petition for a rehearing with the Ninth Circuit, the court on January 31, 1990, once again instructed the district court to dismiss petitioner's EAJA petition on the ground that it had not been filed timely.

14. The Secretary once again informed this Court by his brief in Sullivan v. Finkelstein, id., (decision issued on June 18, 1990), that he complied with the procedure required by Guthrie, and 42 U.S.C. Section 405(g).

15. On November 6, 1990, the Eleventh Circuit issued a decision in Myers v. Sullivan, id., which indicates that the Circuit still follows Guthrie, Brown, and Taylor, and complies with 42 U.S.C. Section 405(g). It is quite apparent that if the Myers court had been presented with the issue in Melkonyan, that it would have disagreed with the Ninth Circuit's decision in Melkonyan.

16. On December 5, 1990, the Ninth Circuit in Beckstead v. Sullivan, No. 89-15715, (unpublished), 1990 U.S. App. LEXIS 21246, held that Melkonyan should not be applied retroactively.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ZAKHAR MELKONYAN, PETITIONER	)	
v.	)	No. 90-5538
LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES,	)	

CERTIFICATE OF SERVICE

I, John Ohanian, hereby certify that all parties required to be served have been served copies of the REPLY BRIEF FOR PETITIONER, by mail on December 24, 1990, pursuant to Supreme Court Rules 29.3 and 29.4, by depositing an envelope containing the above document in the United States mail properly addressed to each of them and with first-class postage prepaid.

The name and address of the party served is as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

John Ohanian Affiant

December 24, 1990